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IN SUPREME COURT, STATE OF WISCONSIN

JANUARY TERM, 1941

No. 111

MAY F. MILLER, AS DONEE, FRED A. MILLER, AS SETTLOR, OSCAR F. TREICHLER, AS TRUSTEE,
Petitioners,

PETITIONER MAY F. MILLER,
Appellant,

vs.

WISCONSIN DEPARTMENT OF TAXATION,
Respondent.

JURISDICTIONAL STATEMENT UNDER AND PURSUANT TO RULE 12, PARAGRAPH 1, OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES.

(a) This is an appeal to the Supreme Court of the United States from a judgment of the Supreme Court of the State of Wisconsin (Justice Fritz dissenting), affirming a gift tax assessment made by the Wisconsin Department of Taxation involving a construction of a gift tax act of the State of Wisconsin upon a challenge that as construed by the Wisconsin Department of Taxation, which construction was affirmed by the State Supreme Court, and applied as so construed, it was in contravention of the equal protection

and due process clauses of the 14th Amendment to the United States Constitution; the Federal statutory provision believed to sustain the jurisdiction of the Supreme Court of the United States is Section 344, paragraph (a), Title 28 of the United States Code.

(b) The statute of the State of Wisconsin the validity of which is involved is Section 72.75, Subsection 4 (2)(d) (Wisconsin Statutes of 1937), which was incorporated in the gift tax law of the State by Chapter 263 of the Laws of Wisconsin of 1937. It reads as follows:

> "Whenever a transfer of property is made upon which there is, or in any contingency there may be, a tax imposed, such property shall be appraised at its clear market value as of the time of the transfer. The value of every future or limited estate, income, interest or annuity dependent upon any life or lives in being, shall be determined by the rule, method, standard of mortality and rate of interest employed by the commissioner of insurance in ascertaining the value of policies of life insurance and annuities for the determination of liabilities of life insurance companies, except that for every future or limited estate, income, interest or annuity the value of which is not based upon an assumed rate of interest, the rate of interest for making such computation shall be five per cent per annum. *The tax so determined shall be construed to be upon the transfer of a proportion of the principal or corpus of the property equal to the present value of such future or limited estate, income, interest or annuity, and not upon any earnings or income of said property produced after the gift, and such earnings or income shall not be exempt from income tax.*" (Italics added).

(c) The date of the judgment of the Supreme Court of the State of Wisconsin sought to be reviewed is June 25th, 1941, and the date upon which the application for appeal was presented is September 10th, 1941.

January 7th, 1938, Fred A. Miller of Wauwatosa, Wisconsin, as the donor, and O. F. Treichler of Milwaukee, Wisconsin, as trustee, entered into a certain trust indenture in writing, copy of which is set forth in the appendix hereto and marked Exhibit "A", wherein the donor transferred irrevocably in trust the sum of Twenty-five Thousand Dollars ($25,000) to the trustee, to the use of the donee, who is the wife of the donor, and provided that the trust should endure for the period of the natural life of the donor, and that upon the termination of the trust the *corpus* in the sum of Twenty-five Thousand Dollars ($25,000) and the future accumulated income thereof should be delivered and paid over to said donee, May F. Miller (R. 65, 66).

The donor was born on April 17th, 1867, and at his nearest birthday was seventy-one (71) years of age at the time of the creation of the trust (R. 48, 49). His life expectancy at that time was eight (8) years (Sec. 314.07, Wisconsin Statutes of 1937). The Commissioner of Insurance on application of the Department of Taxation determined that the present value of the corpus ($25,000) payable at the death of the donor, aged seventy-one (71), at an assumed interest rate of five per cent (5%) per annum, is Seventeen Thousand Thirty-one Dollars ($17,031) and that the present value of the future earnings (by him termed accretions) thereon, at the same assumed rate of five per cent (5%) per annum, was Seven Thousand Nine Hundred Sixty-nine Dollars ($7,969) (R. 59). He therefore determined that the present value of the *corpus* plus the income thereon was the aggregate of said sums, namely, Twenty-five Thousand Dollars ($25,000) (R. 59).

In the court of first instance, namely, the Circuit Court of Milwaukee County, the appellant on statutory appeal from the Wisconsin Board of Tax Appeals, which upheld the construction of the statute in controversy by the Wisconsin Department of Taxation, raised the Federal question

in the case at bar by statutory objection to the order of the Wisconsin Board of Tax Appeals under Section 73.05 (1), subsection (4) of the Wisconsin Statutes of 1937, as follows:

> "It is further contended by the appellant, and this contention in her opinion is fundamental and unanswerable, that unless the construction contended for by the appellant is adopted the statute would offend against the 14th amendment to the Federal Constitution, in that under the construction contended for by the state a person receiving the corpus and the right to its income eight (8) years after the gift is required to pay the same tax as a donee immediately receiving the corpus and the right to *all* future income (not merely eight years' income)" (R. 20).

The same contention was renewed in the Supreme Court of the State of Wisconsin, as will be seen from the decision of that court wherein it passed upon the same in the following language:

> "There can be no claim of a lack of equal protection of the law under the 14th amendment to the U. S. Constitution, for the appellant is treated like all other persons in the same class, i. e. recipients of a principal plus the interest under a trust" (299 N. W. Rep., paragraph 5, p. 29, R. Opinion of Supreme Court).

ARGUMENT.

Both the court of first instance and the State supreme court held that the taxation for gift tax purposes under the statute in controversy, of both the *corpus* and future accruing income of the trust fund in question, was a valid construction of that statute. The appellant contends that the State supreme court, in holding the act as so construed and applied was not in contravention of the 14th amendment, erred:

(a) In that a donee of a gift of *corpus* in the sum of $25,000.00, whether in trust or otherwise, who is entitled to

the *immediate* enjoyment of the *corpus* and all future accruing income, is assessed in precisely the same sum as a donee of a fund the enjoyment of which, together with future accruing income, is postponed for any determinate number of years, and notwithstanding that a present gift of *corpus* is subject only to gift taxation and the future accruing income thereof solely to income taxation; in other words, at 6% per annum, the legal rate of interest in Wisconsin, the donee of a fund and future accruing income, the enjoyment of which is postponed for a period of eight (8) years from the date of the gift, is required to pay a 48% greater tax than the donee of a fund and future accruing income the enjoyment of which is not postponed to any future date but is immediately vested in the donee at the date of the gift.

(b) *The Court may also take judicial notice that in the case at bar, under the provisions of the gift tax act in controversy, at the rate of interest therein prescribed, to-wit, 5%, for making the computations of present value of gifts the enjoyment of which is postponed to a future date, the matured value of the tax on the present worth of the corpus for any determinate number of future years is exactly equal to the tax on the matured value of the corpus for the same number of years.* Thus by taxing a gift of *corpus* in a sum of $25,000.00, and future accruing interest, the enjoyment of which is postponed for eight (8) years, in the identical amount as a gift of *corpus* and all future income the enjoyment of which is immediate, a tax greater by the amount of the tax on the sum of $7,969.00 is exacted of the appellants than is exacted of a donee who is immediately vested with the present enjoyment of the *corpus* and all future income.

This is so because where both an income tax law and gift tax law are in effect, the taxation of deferred income both under the income and gift tax laws must of necessity operate as an arbitrary discrimination against deferred income

where undeferred income is taxed only for income tax purposes and not for gift tax purposes.

For example, under the State court's construction of the statute in controversy, if the algebraic symbol X represent $25,000, the present value of a *corpus* in the same amount the enjoyment of which is immediate and not postponed, and X minus $7969 (the present value of the future accruing income thereon for a period of eight years) represent the present value of the same *corpus* the enjoyment of which is postponed for a period of eight years, and Y represent the future accruing income of either *corpus* for a period of eight years, we then obtain the following equation:

$$X + Y = X - 7969 + Y$$

Now eliminating Y from each side of the equation we have— $X = X - 7969$

a *reductio ad absurdum* and the measure of the arbitrary discrimination complained of.

(c) The state court further erred in that a donee receiving a similar gift in trust, the income of which is currently distributable, is assessed at precisely the same sum as a donee of a similar gift the enjoyment of the income of which is postponed for a determinate number of years.

2. It further erred in holding that the future accruing income was assessable under the act for gift tax purposes notwithstanding the specific prohibition in the act itself that the gift tax should not be assessed upon any earnings or income of said property produced after the gift, but that such earnings or income should be subject to the income tax of the state, and notwithstanding the declaration of the court that future accruing income is not being taxed for gift tax purposes.

For example, in its opinion (299 N. W. 28, at p. 29) the Court asserts:

> "Under the method of computation followed, the interest earned by the $25,000 corpus after the gift and during the life of the trust was not taxed. Indeed, it could not be, for by the gift tax statute above quoted 'such * * * income shall not be exempt from income tax.' "

while at the same page it holds and recites:

> "* * * it is considered that the statement of the trial court in its ruling upon the matter put the case correctly when it said:
>
> " 'The income which is made subject to income taxation and exempted from gift taxes is not that which is included in the gift but that which is received after the gift. The trustee, under the Income Tax Law will pay an income tax on $11,936.38, if the 5 per cent assumed in the Gift Tax Law is received. The present value of that amount as a gift to the donee, May F. Miller, is $7,969. The value of the gift of $25,000 payable in eight years is $17,031. The value of the total gift, therefore, is $25,000. The present value of the gift to the donee of the items mentioned, clearly is distinct from the income to be received by the trustee (and taxable to him) after the gift.' "

The cases believed to sustain the jurisdiction of the United States Supreme Court in the premises are as follows:

Iowa-Des Moines National Bank v. *Bennett*, 284 U. S. 239. The opinion in this case, written by Justice Brandeis, was unanimous;

Cumberland Coal Co. v. *Board of Revision*, 284 U. S. 23. The opinion in this case, written by Justice Holmes, was unanimous;

Raymond v. *Chicago Union Traction Co.*, 207 U. S. 20.

Relevant Summary of Argument in State Court.

For a better understanding of the opinion of the Supreme Court of the State of Wisconsin there is reproduced herewith a summary of the argument in that court, excluding the challenge under the State constitution.

This case involves the proper construction of the State gift tax act embodied in sec. 72.75 (4) (2)(d), Stats., providing as follows:

> "The tax so determined shall be construed to be upon the transfer of a proportion of the *principal or corpus of the property* equal to the present value of such future or limited estate, income, interest or annuity *and not upon any earnings or income of said property produced after the gift and such earnings or income shall not be exempt from income tax.*" (Italics added).

The donor made a gift in trust for the benefit of his wife, the donee, in the sum of $25,000.00, and provided that this principal sum and any income which it might earn prior to his death should be paid to her at his death. The trust was declared to be irrevocable.

The issue presented is whether this statute forbids the assessment for gift tax purposes of income produced by the principal *after the date of the gift* of the principal. The respondent, Wisconsin Department of Taxation, contends that such future accruing income is subject to both gift and income taxation. The appellant contends that it is subject solely to income taxation.

When the statute speaks of taxing income for gift tax purposes in the quoted statutory provision, it must be deemed to refer to income payable out of corpus, which is the only income then *in esse*, and not income payable from the earnings produced by corpus. The latter is by the quoted provision subjected to income taxation as distinguished from gift taxation.

The conception of present worth in determining the value of a sum payable in the future is in no sense technical but in all respects a logical and just rule of valuation. If this were not the meaning of the statute the words "present value" of gifts of corpus would have no significance and the legislature would thereby be chargeable with having employed a meaningless jumble of words. *There would be no necessity for ascertaining present value of a sum payable in the future if the future accruing income produced by the principal after the date of the gift was also subject to gift taxation, because such income at any given rate whatever would then always offset the discount.* But, as before contended, this income may not be considered for gift tax purposes but only for income tax purposes; it is not *in esse* at the date of the gift; it may in fact never be realized. By a system of income taxation it can alone be properly reached as and when it comes into existence without mulcting the taxpayer in taxes for something which may never be received nor enjoyed.

No term estates or remainders were created by the trust in controversy but a single future estate was in fact limited, consisting of corpus with the right to receive the income thereon produced after the gift of that corpus to which that income is but an incident of ownership, as interest is but an incident of principal; it is not *in esse* at the time of the gift; "* * * it is equally well settled that the subject of a gift *inter vivos* must be definite and certain with the property *in esse* at the time of the attempted donation."

If the construction contended for by the State be adopted, the statute would offend against the 14th Amendment to the Federal Constitution. Under such construction a person receiving the corpus and the right to its income eight years after the date of the gift is required to pay the same tax as a donee *immediately* receiving the corpus and the right to *all* future income. It is manifest that such con-

struction violates both the equal protection and the due process clauses of that amendment. For example, the State in the case of May F. Miller receives the tax on $25,000 immediately and enjoys the interest thereon (and deprives the donee thereof) for the expectancy of the life of the donor, namely, eight (8) years before it would otherwise be payable. Aside from the fact that this future accruing income is being subjected to income taxation, the State is actually collecting more money in the form of interest by taxing the present value of the corpus than it receives by taxing for gift tax purposes the balance of the corpus, which is the present value of the future income as a separate interest. In other words, the donee is required to pay on the same corpus and the right to eight years' future income not merely the same tax but a 48% greater sum than the donee receiving *immediately* the same corpus and the right to all future income.

Independently of constitutional limitations, the language of the act in controversy requires the construction urged by the appellant. The correlative provision of the State inheritance tax act, Section 72.15 (5) (Wisconsin Statutes of 1937), which is in *pari materia* with the gift tax provision in controversy, reads as follows:

> "*Basis For Appraisal of Future Estate.* Whenever a transfer of property is made upon which there is, or in any contingency there may be, a tax imposed, such property shall be appraised at its clear market value immediately upon the transfer or as soon thereafter as practicable. The value of every future or limited estate, income, interest or annuity dependent upon any life or lives in being, shall be determined by the rule, method and standard of mortality and rate of interest employed by the commissioner of insurance in ascertaining the value of policies of life insurance and annuities for the determination of liabilities of life insurance companies, except that for every future

> or limited estate, income, interest or annuity the value of which is not based upon an assumed rate of interest the rate of interest for making such computation shall be five per cent per annum. *The tax so determined shall be construed to be upon the transfer of a proportion of the principal or corpus of the estate equal to the present value of such future or limited estate, income, interest or annuity, and not upon any earnings or income of said property produced after death, and such earnings or income shall not be exempt from the income tax. Such tax shall be due and payable forthwith out of the property transferred.*" (Italics added.)

In its prohibition of a gift tax upon earnings or income produced after the gift, the gift tax act recites:

> "and not upon any earnings or income of *said property* produced after the gift."

What property? The antecedent of "said" is found in the very same sentence where it is designated as the "principal or corpus of the property." Thus the legislature substituting the words "principal or corpus of the property" for the words "said property" clearly intended and provided that the gift tax should be laid solely upon income payable directly out of the corpus "and not upon any earnings or income" of the principal or corpus of the property produced after the date of the gift.

What is meant by the words income "produced after the gift" in the gift tax section in controversy. The correlative phrase in the inheritance tax section reads income "produced after *death.*" It is clear therefore that what the legislature had in mind in each case was the *date* of transfer, i. e. the *point of time* marking the return of income for the purpose of corpus taxation on the one hand and income taxation on the other so that the words income "produced after the gift" mean income produced *after the date of the gift* of the principal or corpus of the property. This

construction is also required by the provision of sec. 72.75, subsec. 4, cl. 2 (a) providing that "If the transfer is made in property, the clear market value thereof *at the date* of the gift shall be considered the taxable value of the gift." (Italics added.)

It is obvious that income not in existence at the date of the gift is not possible of evaluation, since there may never be any income. On the other hand income payable out of corpus can readily be valued as of the date of the gift for the reason that it is already *in esse*, i. e. part of the corpus.

The trial judge in his opinion on this vital point of construction construes the word "after" in the phrase income "produced after the gift" to mean exclusive of the gift. He said (R. 77):

> "The income which is made subject to income taxation and exempted from gift taxes is not that which is included in the gift but that which is received *after* the gift."

But this construction, as will be immediately shown, cannot possibly be supported either by the context or any received definition of the word "after". For example in the correlative expression of the inheritance tax act, sec. 72.15(5) stats., it would then cause the relevant clause of that act to read income "produced" (exclusive of) "death", a construction which deprives the quoted clause of any meaning. The same result follows if "after" be construed to mean "by". We would then have sec. 72.15(5) stats. read "income produced (by) death."

The distinction between income payable out of corpus and income accruing from the investment of corpus, it will be seen, is thus made necessary by the context of the gift tax act. The term "income" in and by itself is a word of such comprehensive import that the context in which it is found will alone serve to define the sense in which it is used.

To illustrate, in *State ex rel. Dulaney* v. *Nygaard*, 174 Wis. 597, where the term "income" was construed as broad enough to include stock dividends (a capital redivision of the stockholders' proprietary interest in a corporation), this Court observed at p. 605:

> "It would serve no useful purpose to attempt to analyze the definitions of income as given in the standard dictionaries at the time the amendment was adopted. Very different inferences could be drawn from them and the differences of opinion among lawyers, judges and economists are and were quite irreconcilable."

In 31 C. J. 397, under the title "Income" it is said:

> "Its specific meaning in a particular case is governed by the intent of the parties as deduced from the context * * *. Generally the term may be defined as meaning all that comes in * * *."

It has been held over and over again as a principle of elementary law that if one construction of a statute would operate to render it unconstitutional and another construction thereof would save its validity, that construction must be adopted which will render it valid.

As the Supreme Court of the United States expressed it:

> "The rule is fundamental that if a statute admits of two constructions, the effect of one being to render the statute unconstitutional and of the other to establish its validity, the courts will adopt the latter." *Arkansas Natural Gas Co.* v. *Arkansas R. R. Comm.*, 261 U. S. 379, 43 S. Ct. 387, 388.

An equally elementary rule of statutory construction is that if possible effect must be given to the whole statute and to every part thereof in order to avoid the necessity of rendering invalid any part of it. The rule was thus stated by this Court:

> "It is an elementary rule for the construction of statutes that effect must be given if possible to every

word, clause and sentence thereof." *State* v. *Columbian National Life Ins. Co.*, 141 Wis. 557, 566.

In both Sections 72.15(5) (inheritance taxation) and 72.75(4)(2)(d) (gift taxation) the legislature clearly had in mind the dominant purpose to distinguish between income paid out of capital and income paid from income. It chose to subject to inheritance and gift taxation only that species of income which was payable in the future out of corpus and not to subject to inheritance or gift taxation income payable in the future out of income or earnings from corpus. As to the latter, it specifically prohibited its taxation for inheritance or gift taxation and provided that it was not to be exempt from income taxation. Since it was subject to income taxation it was undoubtedly deemed unfair to also subject it to inheritance or gift taxation. The purpose to prevent double taxation of the same income to both transfer taxation and income taxation is thus convincingly clear.

In *First National Bank* v. *Douglas Co.*, 124 Wis. 15, at p. 18, it was expressly held that intent to impose double taxation is not to be found in the absence of *clear and unambiguous* language to that effect. As Justice Dodge there observed:

> "A further consideration, persuasive though not conclusive, is that intent to impose taxation which is double even from an economic viewpoint is not to be ascribed to legislation, in absence of clear and unambiguous expression." Citing *People* v. *Roberts*, 32 App. Div. 113, 52 N. Y. S. 859; *Toll-Bridge Co.* v. *Osborn*, 35 Conn. 7, 20; *Tennessee* v. *Whitworth*, 117 U. S. 129, 6 S. Ct. 645.

If it be argued that this clarity of purpose and construction is not apparent but that the statute is ambiguous, opposing counsel is in no position to resolve that ambiguity in favor of the taxing authorities, because the law is just

the other way around, namely, that taxing statutes in case of ambiguity or doubt must be resolved in favor of the taxpayer. This Court expressly so held in the case of *Wadhams Oil Co.* v. *State,* 210 Wis. 448, at page 459. I quote:

> "In this case it is not necessary to resort to other rules of construction. If we were to do so, however, the first one with which we would meet would be the rule universal in its application that a tax cannot be imposed without clear and express language for that purpose and where ambiguity and doubt exist it must be resolved in favor of the person upon whom it is sought to impose the tax."

The Federal high court held with respect to statutes imposing taxes in *Gould* v. *Gould,* 245 U. S. 151, 62 L. Ed. 211, 38 S. Ct. 53:

> "In case of doubt they are construed *most strongly* against the government and in favor of the citizen." (Italics added.)

It may be observed with reference to the applicability of the ruling in the case of *Estate of Stephenson,* 171 Wis. 452, with respect to the proper construction to be placed upon Sec. 72.15(5), as amended in 1917, forbidding the taxation of future income from the income of corpus after death for inheritance tax purposes, the effect of the amendment in the light of its constitutional validity and the prevention of double taxation was not considered by the court in that case, the trust indenture having been executed prior to the amendment and no reference to that specific section having been made. It is, therefore, no authority for the proposition that both corpus and future income derived from the earnings of that corpus may both be taxed for inheritance tax purposes. As this Court expressly ruled in *Scobie* v. *Tax Commission,* 225 Wis. 529, at p. 533:

> "The appellant counters that the constitutionality of the tax was not there raised or considered. This is

correct *and what was not considered was not decided.* It was only assumed." (Italics added.)

If, however, it be conceded for the sake of argument that the constitutionality of the statute and its purpose to avoid double taxation was considered, in *Will of Merrill,* 212 Wis. 15, wherein it was held, at p. 19:

> "The state is entitled to an inheritance tax measured by the market value of the interest transferred and the value for taxing purposes cannot be reduced by dividing it into term estates and remainders."

citing as its sole authority for that proposition the *Stephenson* case, a concession which the opinion itself completely negatives for the question here raised was neither mentioned nor decided, that decision is subject to the ruling in *State* v. *Hackbarth,* 228 Wis. 108, where it was said, at page 114:

> "In *McGovern* v. *Eckhart,* 200 Wis. 64, 227 N. W. 300, after extended and careful consideration, the rules of *stare decisis* and *res adjudicata* were modified so as to permit the correction of an error made by this court in a prior decision whenever the court is convinced that for cogent, substantial, and proper reasons a prior ruling in the same or another case ought not to stand as the law of that case and other cases. That modification was declared on the third appeal in an action in which there was under consideration the legislative intent under secs. 116.03 and 116.04, stats. (enacted by ch. 438, Laws of 1903), which had been definitely construed in *Quiggle* v. *Herman,* 131 Wis. 379, 111 N. W. 479, decided in 1907. That construction was questioned, but followed, on the first appeal in *McGovern* v. *Eckhart* (192 Wis. 558, 213 N. W. 332) and also on the second appeal (196 Wis. 178, 218 N. W. 830), although the court then said that the construction was clearly erroneous, and that it would not so construe the statute if the question were being presented as an original propo-

sition. *However, on the third appeal in that case, after the legislature had acquiesced in that construction for over twenty years, and although that construction would ordinarily have been held to control, in view of the established rules of stare decisis, as well as res adjudicata, which also was applicable by reason of the decisions on the first and second appeals in the McGovern case, the court nevertheless overruled that construction because it was convinced then that the prior ruling was probably wrong.* In that connection the court said,—

"'* * * when, as now, we are convinced that the prior ruling in a particular case ought not to stand as the law for that case and other cases, we shall so hold and not deny to litigants or ourselves the right and duty of correcting an error merely because of what we may be later convinced was merely our ipse dixit in a prior ruling in the same case.

"'This court has "time after time overruled its own prior decisions, and we shall therefore now, and hereafter, reserve unto ourselves a right to correct, and recognize the duty so to do, a prior ruling made by us in the same case, whenever cogent, substantial and proper reasons exist."

"'On the second appeal we expressly recognized, and now do so again, that the decision in the *Quiggle Case,* supra, was based upon a mistaken view as to the effect of the statutes there and here involved. Such prior ruling being upon the construction of a statute, on a matter of public policy declared by the legislature, and within its power to so declare, we ought not to hesitate to correct such mistaken pronouncement of ours as to such legislative public policy.' *McGovern* v. *Eckhart,* 200 Wis. 64, 77, 78, 79, 227 N. W. 300."

The income payable to the donee May F. Miller in the case at bar is by the express provisions of Sec. 71.095, subsec. 4, subject to an annual income tax for the life of the trust, which the trustee is required to pay for the account of the donee.

> "All nondistributable, or contingently distributable income not distributed shall be assessed to the trustee in the same manner as income of persons other than corporations is assessed, except that the personal exemptions under section 71.05 (2) shall not be allowed to such trustee."

The income tax thus paid by the trustee is upon the income, if any, of the donee; it comes out of the donee's pocket; the donee is the real party in interest; she is the owner in equity of both corpus and income as and when received. It is the present value of that income, if any, that the State also seeks to impose a gift tax on.

There is appended hereto, in the appendix, a copy of the opinion of the Supreme Court of the State of Wisconsin, marked Exhibit "B", the opinion of the court of first instance, marked Exhibit "C" (R. 75-79), and the opinion of the Wisconsin Board of Tax Appeals, marked Exhibit "D" (R. 37-43).

Dated September 10th, 1941.

A. W. Schutz,
Attorney for Appellant.

EXHIBIT "A".

This Trust Indenture made and executed this 7th day of January, 1938, by and between Fred A. Miller, of Wauwatosa, Wisconsin, hereinafter called the "donor", and O. F. Treichler, of Milwaukee, Wisconsin, hereinafter called the "trustee",

Witnesseth:

1. The donor, as and for a gift inter vivos, does herein and hereby transfer, set over, assign and pay to said trustee in trust, for the uses and purposes hereinafter defined, the sum of Twenty-five Thousand Dollars ($25,000.00).

2. Trustee shall hold and administer said sum during the life of this trust, and invest and re-invest the whole or any part thereof, in his discretion, in securities of the United States or any of the states thereof or the political subdivisions thereof, or in securities of the Dominion of Canada or any of its political subdivisions, or deposit the same or any part thereof in a savings account with any bank under the jurisdiction of said Governments; said sum and the proceeds thereof shall constitute the corpus of the trust fund hereunder, and the trustee shall retain and accumulate the net income thereof during the life of the trust and invest and reinvest it in the same manner as is hereinbefore provided with respect to the corpus.

3. Said trust shall endure for the period of the natural life of the donor, upon the termination of which, said corpus and the accumulated income thereof shall be delivered, paid over and distributed to May F. Miller, the wife of the donor and the beneficiary of this trust.

4. In the event that, by the exercise of any discretion herein vested in the trustee, any loss or damage accrue to the trust estate, such loss or damage shall not be charged or imputed to the trustee, excepting only for bad faith shown in the exercise of such discretion.

5. The parties hereto, so far as they lawfully may, hereby declare that the trust hereby created and defined shall be under the jurisdiction of the Circuit Court of Milwaukee County, Wisconsin, whenever and if the aid of the court shall be invoked.

6. The donor may at his option, from time to time, add to this trust by paying or delivering to the Trustee additional sums of money or securities of the kind and character above described, and all such additional sums of money or securities shall become and be subject to all the terms and provisions hereof.

7. This trust is herein and hereby declared to be irrevocable, and the said O. F. Treichler herein and hereby evidences his consent to act as trustee hereunder.

In Witness Whereof, the parties hereto have hereunto set their hands and seals the day and year first above written.

[SEAL.] FRED A. MILLER,
[SEAL.] O. F. TREICHLER.

In presence of:

A. W. SCHUTZ,
ALYCE JUSTIN.

STATE OF WISCONSIN,
Milwaukee County, ss.

Personally appeared before me this 15th day of July, 1938, the above named Fred A. Miller and O. F. Treichler, to me personally known to be the persons who executed the foregoing Trust Indenture and acknowledged the same as their free act and deed.

[NOTARIAL SEAL.] ALEXANDER SCHUTZ.

Notary Public, Milwaukee County, Wis. My commission expires: Mar. 24, 1940.

EXHIBIT "B".

IN SUPREME COURT STATE OF WISCONSIN

JANUARY TERM, 1941

No. 111.

MAY F. MILLER, as Donee, *Appellant*,

v.

WISCONSIN DEPARTMENT OF TAXATION, *Respondent*.

Appeal from a judgment of the circuit court for Milwaukee County: Daniel W. Sullivan, Circuit Judge.

Affirmed.

Appeal by May F. Miller, as Donee, Fred A. Miller, as Settlor, Oscar F. Treichler, as Trustee, from an assessment of gift taxes made by the Wisconsin Department of Taxation. The assessment was successively affirmed on appeal by the Wisconsin Board of Tax Appeals and the circuit court.

On January 7, 1938, Fred A. Miller, a resident of Wisconsin, set up an irrevocable trust with O. F. Treichler as trustee and his wife, May F. Miller, as beneficiary. The settlor transferred $25,000 which by the terms of the trust indenture was to be held, invested and reinvested by the trustee; and the $25,000 "and the proceeds thereof shall constitute the corpus of the trust fund hereunder." The trust further provided that "said trust shall endure for the period of the natural life of the donor, upon the termination of which, said corpus and the accumulated income thereof shall be delivered, paid over and distributed to May F. Miller, the wife of the donor and the beneficiary of this trust."

At the time of the gift the donor's life expectancy under the statutory table, sec. 314.07, Stats., was eight years. The present value of the gift was determined to be $25,000. Upon that basis an assessment was made under sec. 72.75

(4), Stats., against May F. Miller as the donee of a gift of $25,000. It is from that determination the appeal is taken.

FAIRCHILD, *J.*

The gift was made and there is no question raised as to the correctness of the computation of the actuary accepted by the taxing authorities. The question is as to the value of the gift for tax purposes. Although appellant acquired a presently vested interest in the trust, it was a future interest because the enjoyment and possession was postponed until the future. 1 Simes, Law of Future Interests, p. 2, sec. 1; Restatement, Future Interests, p. 520, sec. 153.

The method for computing present values of future interests is prescribed by sub. 4 (2) (c) and (d) of sec. 72.75, Stats. Subsection (c) requires that the commissioner of insurance shall make the computations and certify them to the commission "and his certificate shall be presumptive evidence that the method of computation adopted therein is correct." Subsection (d) fixes five per cent as a rate of interest where, as here, there is no other rate assumed, and provides that: "The tax so determined shall be construed to be upon the transfer of a proportion of the principal or corpus of the property equal to the present value of such future or limited estate, income, interest or annuity, and not upon any earnings or income of said property produced after the gift, and such earnings or income shall not be exempt from income tax."

Appellant argues that when a valuation of $25,000 is placed on the gift, it taxes the income produced after the gift as well as the principal of the gift, and insists that $17,031 is the present value of a gift of $25,000 to be paid eight years hence.

That contention could be upheld if the gift passing to the donee on the death of the donor were only $25,000. But, as respondent points out, the gift was of $25,000 "and the accumulated interest thereof" for eight years and this amount at five per cent interest compounded annually totals $36,936.38. Under the method of computation followed the

interest earned by the $25,000 corpus after the gift and during the life of the trust was not taxed. Indeed, it could not be, for by the gift tax statute above quoted "such • • • income shall not be exempt from income taxes." Appellants cite *Norris* v. *Tax Comm.*, 205 Wis. 626, 237 N. W. 113 to the point that corpus once subject to an inheritance tax could not again be subject to income tax, and draw an analogy between that case and this on the ground the two statutes involved—gift and inheritance tax statutes—are in pari materia. The statutes are in pari materia according to *Estate of Sanford* v. *Commissioner*, 308 U. S. 39, 60 S. Ct. 51, 84 L. Ed. 20. As to the analogy, however, it is considered that the statement of the trial court in its ruling upon the matter put the case correctly when it said:

"The income which is made subject to income taxation and exempted from gift taxes is not that which is included in the gift but that which is received after the gift. The trustee, under the Income Tax Law will pay an income tax on $11,936.38, if the 5 per cent assumed in the Gift Tax Law is received. The present value of that amount as a gift to the donee, May F. Miller, is $7,969. The value of the gift of $25,000 payable in eight years is $17,031. The value of the total gift, therefore, is $25,000. The present value of the gift to the donee of the items mentioned, clearly is distinct from the income to be received by the trustee (and taxable to him) after the gift.

"The rule followed in the present case that the state is entitled to a tax based upon the entire value of the interest transferred is that which is followed with respect to inheritance taxation. The gift here is of $25,000 and of the income thereon. The rule applicable as to inheritance taxes on such a gift is that it is to be deemed to be for the full sum of $25,000. *Estate of Stephenson* (1920) 171 Wis. 452; *Will of Merrill* (1933) 212 Wis. 15. No reason is perceived why the same rule should not be applied as to gift taxes. *Burnett* v. *Berggenheim* (1933), 288 U. S. 280, 77 L. Ed. 748."

There can be no claim of a lack of equal protection of the law under the 14th amendment to the U. S. Constitution, for the appellant is treated like all other persons in the

same class, i. e. recipients of a principal plus the interest under a trust.

It is our conclusion that when the entire benefits, both corpus and accumulated income, of a gift in trust are to be distributed to one person upon the termination of the trust, the value of the gift to the donee is equal to the amount or value of the property originally transferred in trust. The amount of the gift subject to the gift tax is obviously the present value of the total future estate, whatever the rate of interest. See *Estate of Stephenson,* 171 Wis. 452, 459, 177 N. W. 579, where it was said in regard to the value of term estates and remainders created by a trust "where the terms tenant and the remainderman are the same, as in this case, there is no necessity of separately valuing the term estate and the remainder, since the value of one added to the value of the other always equals the value of the whole estate."

By the Court:—Judgment affirmed.

EXHIBIT "C".

STATE OF WISCONSIN, MILWAUKEE COUNTY.

Circuit Court, Branch No. 2.

No. 171-140.

MAY F. MILLER, as Donee, FRED A. MILLER, as Settlor, OSCAR F. TREICHLER, as Trustee, *Petitioners,*

vs.

WISCONSIN DEPARTMENT OF TAXATION, *Respondent.*

Decision.

Daniel W. Sullivan, Judge Presiding: Appellants seek a review, pursuant to sec. 73.015, Stats. 1939, of a decision and order of the Wisconsin Board of Tax Appeals affirming an assessment of the Wisconsin Department of Taxation

of gift taxes levied on a gift in trust by Fred A. Miller for the benefit of his wife, May F. Miller.

January 7, 1938, said Fred A. Miller, then 71 and having a life expectancy of eight years, entered into a trust indenture, as donor, with one O. F. Treichler as trustee whereby the sum of $25,000 was transferred to the trustee, under an irrevocable trust, for the use and benefit of the donor's wife, May F. Miller, as donee or beneficiary.

The trust instrument requires the trustee to invest and reinvest the whole or any part of the trust fund in his discretion, and retain and accumulate the net income thereof during the life of the trust and invest and reinvest same as in case of the corpus, the said principal and income both being deemed corpus. Further it provided:

"Said trust shall endure for the period of the natural life of the donor, upon the termination of which, said corpus *and* the accumulated income thereof shall be delivered, paid over and distributed to May F. Miller, the wife of the donor and the beneficiary of this trust."

The "gift tax" "is imposed upon transfers of property, real, personal or mixed, or any interests therein *or income therefrom,* in trust or otherwise," and is based upon "the clear market value thereof at the date of the gift" Sec. 72.75, sec. 4 (1), (2) (a). The Commissioner of Insurance, upon application of the Tax Commission "shall determine the value of any future or contingent estates * * * and his certificate shall be presumptive evidence that the matter of computation therein is correct" 72.75 sec. 4 (2) (c). Finally it is provided that "the value of every future or limited estate, income, interest or annuity dependent upon any life or lives in being, shall be determined by the rule * * * employed by the Commissioner of Insurance in ascertaining the value of policies of life insurance and annuities for the determination of liabilities of life insurance companies, except that for every future or limited estate, income, interest or annuity the value of which is not based upon an assumed rate of interest, the rate of interest for making such computation shall be five per cent per annum. The tax so determined shall be construed to be upon the transfer of a proportion of the principal or corpus

of the property equal to the present value of such future or limited estate, income, interest or annuity, and not upon any earnings or income of said property produced after the gift, and such earnings or income shall not be exempt from income tax" Sec. 72.75 (sec. 4) (2) (d).

The Commissioner of Insurance, on application of the Department of Taxation as provided in the Gift Tax Law, made determination that the present value of the interest of the donee, May F. Miller, in the "$25,000 *plus* accumulated income," payable at the death of the donor, was $25,000, upon which the gift tax was computed.

The argument of counsel for the petitioners is that the present value of a gift of $25,000, payable in eight years, computed as provided in the Gift Tax Law, above quoted, including the requirement for interest computation at 5%, is $17,031, and that the tax should be computed upon this amount. However, the gift was not merely of $25,000, but of "said corpus ($25,000) *and* the accumulated income thereof * * *." The corpus plus accumulations at 5%, as required by the law, for eight years, would amount to $36,936.38. The *present value* of said latter sum, as computed by the Insurance Commissioner, in accordance with the Act, is $25,000.

I am unable to concur in the view that the inclusion of the *accumulations* as a part of the gift is in fact a levy upon the "income of said property produced *after* the gift * * *" as provided in sec. 72.75 (2) (d) above quoted. The income which is made subject to income taxation and exempted from gift taxes is not that which is included in the gift but that which is received *after* the gift. The trustee, under the Income Tax Law will pay an income tax on $11,936.38, if the 5% assumed in the Gift Tax Law is received. The present value of that amount as a gift to the donee, May F. Miller, is $7,969. The *value* of the gift of $25,000 payable in eight years is $17,031. The value of the total gift, therefore, is $25,000. The present *value* of the gift to the *donee* of the items mentioned, clearly is distinct from the income to be received by the *trustee* (and taxable to him) *after* the gift.

The rule followed in the present case that the state is entitled to a tax based upon the entire value of the interest

transferred is that which is followed with respect to inheritance taxation. The gift here is of $25,000 and of the income thereon. The rule applicable as to inheritance taxes on such a gift is that it is to be deemed to be for the full sum of $25,000. *Estate of Stephenson* (1920) 171 Wis. 452; *Will of Merrill* (1933) 212 Wis. 15. No reason is perceived why the same rule should not be applied as to gift taxes. *Burnett* v. *Berggenheim* (1933) 288 U. S. 280, 77 L. ed. 748.

It follows that the assessment and tax must be affirmed.

EXHIBIT "D".

WISCONSIN BOARD OF TAX APPEALS.

Docket No. G-304.

MAY F. MILLER, as Donee, FRED A. MILLER, as Settlor, OSCAR F. TREICHLER, as Trustee, *Petitioners,*

vs.

WISCONSIN DEPARTMENT OF TAXATION, *Respondent.*

Decision and Order.

This is an appeal from an assessment of a gift tax on a gift made by Fred A. Miller, in trust, to his wife, May F. Miller, as beneficiary and donee.

From the record herein, we find the following to be the material facts: On January 7, 1938, Fred A. Miller, of Wauwatosa, Wisconsin, as the donor, and O. F. Treichler, of Milwaukee, Wisconsin, as trustee, entered into a certain trust indenture in writing, wherein the donor created an irrevocable trust of $25,000 for the uses defined in said trust agreement. May F. Miller, the wife of the donor, was named as the beneficiary or donee. The donor transferred said sum of $25,000 to the trustee pursuant to said trust indenture, which provided that the trust should endure for the period of the natural life of the donor, upon the termination of which the corpus and the accumulated income thereof should be delivered and paid over to said May F. Miller.

The donor was born on April 17, 1867, and was 71 years of age at the time of the creation of the trust. His life expectancy at that time, pursuant to section 314.07 of the Wisconsin statutes, was 8 years. The donee was born on February 6, 1880.

The Commissioner of Insurance, on application of the Department of Taxation, determined the present value of the interests of the donee to be $25,000. He further determined that the present value of a gift of $25,000, payable at the death of a donor, aged 71, without accretions, on the basis of the American Experience Table of Mortality, and an interest assumption of 5 per cent per annum, to be $17,031, and that the proportionate corpus equal to the value of the accretions at the time of the gift was $7,969, making a total value of $25,000 at the time of gift.

The question at issue herein is the value of the gift, for gift tax purposes, made by the donor to the donee.

The following statutes are involved:

Section 4, Chapter 363, Laws of 1933, as Amended (Section 72.75, Stats.)

"(1) An emergency tax is imposed upon transfers of property, real, personal or mixed, or any interests therein or income therefrom, in trust or otherwise, to any person, * * *

(a) When the transfer is by gift from any person who at the date of such gift was a resident of the state.

(b) * * * (c) * * *

(2) (a) If the transfer is made in property, the clear market value thereof at the date of the gift shall be considered the taxable value of the gift. * * *

(b) * * *

(c)The commissioner of insurance shall, on application of the tax commission, determine the value of any future or contingent estates, income, or interests therein, limited, contingent, dependent or determinable upon the life or lives of the person or persons in being to whom the transfer is made and certify the same to the commission, and his

certificate shall be presumptive evidence that the method of computation adopted therein is correct.

(d) Whenever a transfer of property is made upon which there is, or in any contingency there may be, a tax imposed, such property shall be appraised at its clear market value as of the time of the transfer. The value of every future or limited estate, income, interest or annuity dependent upon any life or lives in being, shall be determined by the rule, method, standard of mortality and rate of interest employed by the commissioner of insurance in ascertaining the value of policies of life insurance and annuities for the determination of liabilities of life insurance companies, except that for every future or limited estate, income, interest or annuity the value of which is not based upon an assumed rate of interest, the rate of interest for making such computation shall be five per cent per annum. The tax so determined shall be construed to be upon the transfer of a proportion of the principal or corpus of the property equal to the present value of such future or limited estate, income, interest of annuity, and not upon any earnings or income of said property produced after the gift, and such earnings or income shall not be exempt from income tax.

(7) (k) The word 'transfer' as used in this section shall be taken to include the passing of property or an interest therein, in possession or enjoyment, present or future, by deed, grant, bargain, sale or gift in the manner herein prescribed. * * *."

The petitioner calls attention to the following provision of the statutes: "that the tax so determined shall be construed to be upon the transfer of a proportion of the principal * * * of the property equal to the present value of such future or limited estate * * * and not upon any earnings or income of said property produced after the gift, and such earnings or income shall not be exempt from income tax."

The petitioner contends that because of said provision of the statute, the amount of $7,969, as determined by the Commissioner of Insurance, are earnings on the corpus and the gift tax should be computed only upon the sum of $17,031.

The respondent contends that Subsections (c) and (d) of Section 1 of the gift tax law are the same as Subsections (4) and (5) of Section 72.15 of the inheritance tax law. It contends that the donor transferred the sum of $25,000, retaining no interest in the amount transferred. It states that by the terms of the trust two future estates or interests are created, one a term estate and the other an estate in remainder; that both of these estates are included within the definition of "transfers" under Subsection (7) (k) of the gift tax law; that both estates were given by the trust instrument to the same donee and that the gift tax should be computed upon the total sum of $25,000 which was transferred.

The provisions of the gift tax law are practically identical with the provisions of the inheritance tax law so far as they apply to the computation of the tax, and the decisions under the inheritance tax law must govern. The Wisconsin Supreme Court has repeatedly held that inheritance tax is not a tax upon property or property rights in any sense, but is an excise tax levied upon the transfer of property.

"For taxing purposes the value of an estate cannot be diminished by dividing it into term estates and remainders. The state is entitled to an inheritance tax measured by the clear market value of the property transferred." *Estate of Stephenson*, 171 Wis. 452.

In the same case, one page 459, the court said:

"Where the term tenant and the remainderman are the same, as in this case, there is no necessity of separately valuing the term estate and the remainder, since the value of one added to the value of the other always equals the value of the whole estate."

The donor here transferred the sum of $25,000 and completely divested himself of any interest therein. It is obvious that he transferred that amount to someone. Even though the gift is considered as two future estates, one a term estate and the other an estate in remainder, the donee received both, and the total value thereof is $25,000 as determined by the Commissioner of Insurance. We find, there-

fore, that the value of the gift for gift tax purposes on January 7, 1938, was $25,000.

It Is Ordered:

That the assessment appealed from be and the same is hereby confirmed.

Dated at the State Capitol in Madison, Wisconsin, this 15th day of March, 1940.

WISCONSIN BOARD OF TAX APPEALS,

W. J. CONWAY,
Chairman,
G. L. BROADFOOT,
HARRY SLATER.

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